Malaysian Industrial Development Finance Bhd v Arahektar Bina Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-1651–10 OF 2011
LEE SWEE SENG JC
21 MAY 2012

Civil Procedure — Summary judgment — Triable issues — Whether defendants had raised triable issues — Res judicata — Raising same issues — Whether defence raised was basis of defendants' claim in earlier suit — Whether defendants permitted to raise same issue again

Arahektar Bina Sdn Bhd ('ABSB') had entered into two industrial hire purchase agreements ('the HPAs') with Malaysian Industrial Development Finance Bhd ('MIDF') for the financing of the purchase of heavy vehicles for the construction industry. The second and third defendants were the guarantors for the two HPAs. Under the terms of the two HPAs, ABSB was to pay MIDF monthly installments with interest, and a default interest to be imposed in the event of a default in repayment of the monthly installment. When ABSB defaulted in its monthly installments, MIDF had issued a notice of demand to terminate the two HPAs and to claim the outstanding amounts with interest. Notices of demand were also sent to the second and third defendants, as guarantors under the guarantee and indemnity agreement signed by them in favour of MIDF. Subsequently, MIDF filed the present writ action against ABSB and the second and third defendants for the balance outstanding under both the HPAs. However, sometime in 2008, ABSB had commenced an action against MIDF and four others for a conspiracy to defraud ABSB ('the 2008 suit'). In the 2008 suit, ABSB had claimed that there was collusion or conspiracy among two of the officers of MIDF and the directors of a company known as Iron Module Sdn Bhd, which was the supplier of the heavy vehicles that were the subject matter of the first HPA. The 2008 suit was dismissed with costs after the court found that ABSB had not proved its allegations of fraud beyond reasonable doubt. Thus, when MIDF commenced the present action, ABSB and the second and third defendants had applied to strike out MIDF's claim on the grounds of res judicata. However, the defendants' application to strike out MIDF's action was dismissed with costs. Subsequently, MIDF commenced the present application for summary judgment under O 14 of the Rules of the High Court 1980 against ABSB and the other two defendants. ABSB and the other defendants opposed the summary judgment application and argued that there were triable issues. ABSB again raised the defence of the conspiracy to defraud between two of the officers of MIDF and the directors of a company known as Iron Module Sdn Bhd, which was the supplier of the

heavy vehicles that were the subject matter of the first HPA. MIDF claimed that this issue had already been raised in the 2008 suit. However, MIDF admitted that the second HPA was not the subject of the 2008 suit.

Held, allowing the application in part with half the fixed costs for summary judgment:

(1) There was a triable issue raised by the defendants with respect to the second HPA, which would justify the claim being set down for trial. This court was entitled to allow summary judgment for that part of the claim where there were no triable issues. As such, this court dismissed MIDF's application for summary judgment with respect to the second HPA but allowed summary judgment to be entered in respect of the first HPA (see paras 6–7).

(2) ABSB and the other two defendants should not be allowed to raise the defence of a conspiracy to defraud, which was in substance the basis of their claims in the 2008 suit, to raise the same issues again in the present action by MIDF. To allow this would be to offend the principle of res judicata. ABSB and the defendants had not appealed against the decision of the trial judge in the 2008 suit, when he dismissed their claim with costs. Thus the judgment passed in the 2008 suit was final, conclusive and binding and ABSB and the other two defendants should not be allowed to re-litigate the same issue of a conspiracy to defraud them in the present case. As such, there were no triable issues that would justify MIDF's claim going to trial. Thus, MIDF's application for summary judgment for claims under the first HPA should be allowed (see para 17).

[Bahasa Malaysia summary

Arahektar Bina Sdn Bhd ('ABSB') memasuki dua perjanjian sewa beli perindustrian ('PSB') dengan Malaysian Industrial Development Finance Bhd ('MIDF') untuk pembiayaan pembelian kenderaan-kenderaan berat untuk industri pembinaan. Defendan-defendan kedua dan ketiga adalah penjamin-penjamin untuk kedua-dua PSB. Di bawah terma-terma kedua-dua PSB, ABSB dikehendaki membayar MIDF bayaran ansuran bulanan dengan faedah, dan faedah ingkar akan dikenakan jika pengingkaran pembayaran bayaran ansuran bulanan. Apabila ABSB mengingkari bayaran ansuran bulanannya, MIDF mengeluarkan notis tuntutan untuk menamatkan kedua-dua PSB dan menuntut jumlah tertunggak dengan faedah. Notis-notis tuntutan juga dihantar kepada defendan-defendan kedua dan ketiga, sebagai penjamin-penjamin di bawah jaminan dan perjanjian indemniti yang ditandatangani oleh mereka memihak MIDF. Kemudiannya, MIDF memfailkan tindakan writ ini terhadap ABSB dan defendan-defendan kedua dan ketiga untuk baki tertunggak di bawah kedua-dua PSB tersebut. Walau bagaimanapun, pada satu masa pada tahun 2008, ABSB telah memulakan tindakan terhadap MIDF dan empat orang lain untuk konspirasi untuk

menipu ABSB ('tindakan 2008'). Dalam tindakan 2008, ABSB telah menuntut bahawa terdapat pengetahuan atau konspirasi di antara dua pegawai MIDF dan pengarah-pengarah syarikat yang dikenali sebagai Iron Module Sdn Bhd, yang mana adalah pembekal kenderaan-kenderaan berat yang menjadi perkara subjek PSB pertama. Tindakan 2008 ditolak dengan kos selepas mahkamah mendapati bahawa ABSB tidak membuktikan dakwaan-dakwaannya mengenai fraud melampaui keraguan munasabah. Oleh itu, apabila MIDF memulakan tindakan ini, ABSB dan defendan-defendan kedua dan ketiga telah memohon untuk membatalkan tuntutan MIDF atas alasan-alasan res judicata. Walau bagaimanapun, permohonan defendan-defendan untuk membatalkan tindakan MIDF ditolak dengan kos. Kemudiannya, MIDF memulakan permohonan ini untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap ABSB dan dua defendan lain. ABSB dan defendan-defendan lain membantah permohonan penghakiman terus dan berhujah bahawa terdapat isu yang boleh dibicarakan. ABSB sekali lagi membangkitkan pembelaan konspirasi untuk menipu di antara dua pegawai MIDF dan pengarah-pengarah syarikat yang dikenali sebagai Iron Module Sdn Bhd, yang mana adalah pembekal kenderaan-kenderaan berat yang menjadi perkara subjek PSB pertama. MIDF mendakwa bahawa isu ini telah dibangkitkan di dalam tindakan 2008. Walau bagaimanapun, MIDF mengaku bahawa PSB kedua bukan subjek tindakan 2008.

Diputuskan, membenarkan sebahagian permohonan dengan setengah kos yang ditetapkan untuk penghakiman terus:

(1) Terdapat isu yang boleh dibicarakan dibangkitkan oleh defendan-defendan berkaitan PSB kedua, yang akan menjustifikasikan tuntutan yang ditetapkan untuk perbicaraan. Mahkamah ini berhak membenarkan penghakiman terus untuk bahagian tuntutan tersebut di mana tidak terdapat isu yang boleh dibicarakan. Oleh itu, mahkamah ini menolak permohonan MIDF untuk penghakiman terus berkaitan PSB kedua tetapi membenarkan penghakiman terus dimasukkan berkaitan PSB pertama (lihat perenggan 6–7).

(2) ABSB dan dua defendan lain tidak patut dibenarkan membangkitkan pembelaan konspirasi untuk menipu, yang mana merupakan bahan asas tuntutan mereka di dalam tindakan 2008, tuntuk membangkitkan isu yang sama di dalam tindakan ini oleh MIDF. Untuk membenarkan ini akan melanggar prinsip *res judicata*. ABSB dan defendan-defendan tidak merayu terhadap keputusan hakim perbicaraan di dalam tindakan 2008, apabila dia menolak tuntutan mereka dengan kos. Oleh itu penghakiman yang dijatuhkan dalam tindakan 2008 adalah muktamad, konklusif dan mengikat dan ABSB dan dua defendan lain tidak patut dibenarkan untuk melitigasi isu yang sama konspirasi untuk menipu mereka di dalam kes ini. Oleh itu, tidak terdapat isu yang boleh dibicarakan yang akan

menjustifikasikan tuntutan MIDF untuk dibicarakan. Oleh itu, permohonan MIDF untuk penghakiman terus untuk tuntutan-tuntutan di bawah PSB pertama patut dibenarkan (lihat perenggan 17).]

Notes

For cases on triable issues, see 2(3) *Mallal's Diegst* (4th Ed, 2010 Reissue) paras 8316–8423.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Brisbane City Council v Attorney-General for Queensland [1979] AC 411, PC (refd)
Chee Pok Choy v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 2 CLJ 321, CA (refd)
Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74 (refd)
Hartecon JV Sdn Bhd v Hartela Construction Ltd [1996] 2 MLJ 57; [1996] 2 AMR 1457, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 14 rr 1, 3(1), O 18 r 19(1)(d), O 92 r4

Mohd Abdul Hakim bin Mohd Ali (Shahinuddin & Ranjit) for the plaintiff/applicant.
Lim Yew Hock (Yew Hock & Loh) for the defendants/respondents.

Lee Swee Seng JC:

PROLOGUE

[1] The plaintiff in this writ action had sued the first defendant (D1) under two industrial hire purchase agreements ('HPAs'). There was a First HPA dated 22 May 2006 and a second HPA dated 4 July 2006. D1 defaulted in the hire purchase instalments for both the first and second HPAs and so the paintiff sued for the balance outstanding under both the HPAs. The plaintiff also sued the second and third defendants ('D2 and D3') as guarantors under a guarantee and indemnity agreement dated 22 May 2006 and 4 July 2006 for the first and second HPAs respectively.

PROBLEM

[2] The defendants had earlier taken a proactive stance in the form of a pre-emptive strategy in that instead of waiting for the plaintiff here to sue them under the HPAs, they had instead as plaintiffs sued in Suit No D2–22–1299 of 2008 ('the 2008 suit') for conspiracy to defraud them and the plaintiff here was the fifth defendant in the 2008 suit. That strategy proved sterile and fizzled out

when the 2008 suit was dismissed with costs after the defendants submitted no case to answer and the court found that the plaintiffs there had not proved their allegations of fraud beyond reasonable doubt. The learned High Court judge issued the usual caution that the defendants would 'stand or fall on their submissions of 'no case to answer' and learned defence counsel there agreed to abide by the decision of the court. That order was made on 3 October 2011 and there had been no appeal against it.

[3] When the plaintiff commenced the action herein the defendants had earlier applied to strike out the action under O 18 r 19(1)(d) and under O 92 r 4 of the Rules of the High Court 1980 ('RHC') on ground that the doctrine of res judicata applies. After having considered the arguments, I had on 8 February 2012 dismissed with costs the defendants application and I gave a full written judgment setting forth my reasons for dismissing the application to strike out.

PRAYER

[4] After having dismissed the defendants' application I then proceeded on another date to hear this application of the plaintiff for summary judgment against the defendants under O 14 r 1 of the RHC against the defendants. The summary judgment application in encl 9 is for judgment to be entered for, inter alia, the following:

(a) the sum of RM1,626,490.39 for the facility under the first HPA for RM1,204,330.10 as at 31 August 2011;

(b) interest at the rate of 15%pa from 1 September 2011 till the date of realisation on the sum of RM1,626,490.39;

(c) the sum of RM1,078,321.82 for the facility under the second HPA for RM1,145,669.90 as at 31 August 2011;

(d) interest at the rate of 15%pa from 1 September 2011 till the date of realisation on the sum of RM1,078,321.82; and

(e) costs of this action.

[5] The plaintiff's learned counsel Encik Hakim Mohd Ali admitted that the second HPA was not the subject of the 2008 suit which was only confined to the first HPA. The defendants here had named two officers of the plaintiff one Mr Thong and Encik Syed who had colluded and conspired with the directors of Iron Module Sdn Bhd and its directors namely Encik Ibrahim bin Mat Hassan and Mr Leong Chin Yip and Liong Kok Wah to secure financing from the plaintiff when in fact the subject matter of the financing, the heavy vehicles for the construction industry, were never delivered by the Supplier Iron Module Sdn Bhd to D1.

[6] As there were no affidavits from Mr Thong or Encik Syed or from the plaintiff to deny the same, there was a triable issue raised by the defendants with respect to the second HPA which would justify the claim being set down for trial where the relevant witnesses would have to be called to refute the allegations raised by the defendants. I had therefore dismissed the plaintiff's application for summary judgment with respect to the second HPA and had only allowed the plaintiff's summary judgment claim under the first HPA with respect to the claim under prayers (a)–(b) above. This the court is entitled to do if it finds that there are no triable issues for part of the claim and therefore would allow summary judgment for only that part of the claim. Order 14 r 3(1) of the RHC provides:

> Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, *or the part of a claim,* to which the application relates *that there is an issue or question in dispute which ought to be tried* or that there ought for some other reason to be a trial of that claim or part, *the Court may give such judgment for the plaintiff against that defendant* on that claim or part as may be just having regard to the nature of the remedy or relief claimed. (Emphasis added.)

[7] As there was no appeal by the plaintiff on that part of the claim under the second HPA in prayers (c)–(d) above that had been dismissed, this judgment shall not deal with it. Since the appeal is only by the defendants against the decision of this court is allowing summary judgment for the claim under the first HPA in prayers (a) and (b) above, this judgment shall be confined to the reasons for allowing summary judgment to be so entered against the defendants under the first HPA.

PRINCIPLE

[8] As stated earlier the only issue that could be said to be a triable issue under the first HPA is the alleged conspiracy of two officers of the plaintiff namely one Mr Thong and Encik Syed. These two officers it was alleged by the defendants here, had colluded and conspired with the supplier of the heavy vehicles, the subject matter of the first HPA, to release the facility to the supplier when there was no vehicles delivered to D1.

[9] That defence raised in the affidavits filed by the defendants to oppose the summary judgment application had been litigated in the 2008 suit where the defendants here were the plaintiffs there. In the 2008 suit the defendants were as follows: the first defendant Iron Module (M) Sdn Bhd, the second defendant Ibrahim bin Mat Hassan, the third defendant Leong Chin Yip, the fourth defendant Liong Kok Wah and the fifth defendant the plaintiff in this suit. The plaintiffs in the 2008 suit had sought a declaration that the first HPA dated 22 May 2006 between the first plaintiff there Arahektar Bina Sdn Bhd and the

fifth defendant Malaysian Industrial Development Finance Bhd ('MIDF') was null and void for illegality. The plaintiffs there also claimed damages arising out of the conspiracy to defraud by the defendants there.

[10] The second and third defendants in the 2008 suit are directors of the first defendant there. The fourth director is a majority shareholder and 'shadow director' of the first defendant there. The fourth defendant was also said to be the 'shadow director' of Syarikat Ukay Springs Development Sdn Bhd (previously known as Quintrix Land Sdn Bhd) ('Quintrix') and later became its director. The fifth defendant MIDF is a financial institution incorporated in Malaysia.

[11] The gist of the plaintiffs' claim as found by His Lordship Mohd Zawawi Salleh J in the 2008 suit was that the fourth defendant there had met with the first plaintiff at the end of 2005 with respect to the execution of earthworks for Quintrix for the construction of a bungalow in Ukay Perdana, Ulu Klang, Selangor. The first plaintiff there entered into an agreement with Quintrix and thereby incurred costs and expenses and payments to subcontractors for the earth works done. The first plaintiff there had claimed for the payments made from Quintrix and/or the fourth defendant. It was alleged by the plaintiffs there that in order to make payments to the first plaintiff, the fourth defendant entered into an arrangement with the fifth defendant MIDF wherein under such an agreed scheme, monies will be released to the first defendant there and the first defendant will deliver to the first plaintiff the four units of Caterpillar Bulldozer. As the first plaintiff there was under some economic duress arising out of the incessant demands from subcontractors and suppliers for payments, the first plaintiff entered into the first HPA with the fifth defendant there MIDF based on the said scheme. The second and third plaintiffs executed a guarantee and indemnity agreement with the fifth defendant as well.

[12] The plaintiffs alleged at the trial in the 2008 suit that there was a collusion or conspiracy among the defendants to defraud the plaintiffs in that:

(a) the fifth defendant through its officers one Mr Thong and Encik Syed colluded and conspired with and/or facilitated the first defendant to the fourth defendant in obtaining the facility of RM1,204,330.10 for the first plaintiff there with full knowledge that there were no bulldozers delivered by the first defendant there to the first plaintiff;

(b) Mr Thong had a meeting with the fourth defendant and the plaintiffs in the 2008 suit in the office of the fourth defendant at Quintrix office before the letter of offer of 12 April 2006 from the fifth defendant MIDF was issued to the first plaintiff there for the scheme to be carried out; and

(c) further to the scheme hatched by the fourth defendant there together with the first, second and third defendants to facilitate the release of the

amount financed for the first plaintiff to the first defendant, the officers of the fifth defendant MIDF with the fifth defendants gave a false picture that the bulldozers will be delivered to the first defendant and to prepare and finalise the relevant supporting documents.

[13] The first, second, third and fifth defendants there denied each and every such allegations of the plaintiffs. In analysing the evidence of the plaintiffs' witnesses at para 16 of the judgment the learned judge found that in essence 'the plaintiffs there had executed the first HPA because they were faced with threats including those of a physical nature to themselves and their family members from some subcontractors and/or suppliers. The plaintiffs were persuaded and/or coerced to execute all documents by the fourth defendant including delivery orders to ensure the released of the amount financed under the agreement from the fifth defendant to the first defendant, although no delivery of the vehicles were made. The sum of RM1,204,330.10 were released by the fifth defendant MIDF there to the first defendant but not to the first plaintiff as it was supposed to be'.

[14] The learned judge in evaluating the evidence adduced came to this conclusion in para 17 of his judgment that it was clear based on the totality of the evidence of the plaintiffs' witnesses there that the plaintiffs were not happy with the fourth defendant who had failed to fulfill his promise to pay the instalments owing under the first HPA. This fact was admitted by PW1 during cross-examination. The evidence adduced showed that the fourth defendant was the main character that had devised the scheme for the financing from the fifth defendant. The scheme proposed had arisen from the plaintiffs' requests for financing. There was no credible evidence pointing to the fact that from the very inception there was an intention to defraud the plaintiffs. The learned judge held that the fact of the fourth defendant not fulfilling his promise to pay the monthly instalments under the industrial hire purchase agreement by itself does not mean that there was fraud perpetrated within the meaning of the law.

[15] It was a further finding of the learned judge in para 18 of his judgment that PW1 during cross-examination admitted that the first, second and third defendants were not mentioned at all as those involved in the scheme to defraud the plaintiffs in his examination-in-chief. The reverse is true in that PW1 gave evidence that the first, second and third defendants had not attended any meetings with respect to the allegations of collusion and conspiracy to defraud the plaintiffs. Even the police report lodged made reference only to the fourth defendant alone.

[16] The learned judge also referred in para 20 of his judgment that with respect to the allegation of false chassis numbers of the vehicles referred to there and that the plaintiffs had hot called any officer from the Transport

Department or any chemist to prove the fact. In his penultimate conclusion at para 32 of his judgment the learned judge stated that though the court would accept as true the evidence of the plaintiffs, yet the plaintiffs must prove on a beyond reasonable the allegations of fraud perpetrated by the defendants. The learned judge went on to affirmatively find at para 34 of his judgment that based on the grounds given the court had no hesitation to conclude that the plaintiffs had not proved beyond reasonable doubt to warrant the declarations prayed for. In the circumstance the plaintiffs' claims there were dismissed with costs.

[17] The defendants here should not be allowed to raise the defence of a conspiracy to defraud which was in substance the basis of their claims in the 2008 suit and which claims there had failed. To allow the plaintiffs here to raise the same issues again would be to offend the principle of res judicata. They had not appealed against the decision of the learned judge dismissing their claims with costs in the 2008 suit. The said judgment is final, conclusive and binding and the plaintiffs there who are the defendants here should not be allowed to relitigate again the whole same issue of a conspiracy to defraud them. To allow them to do so in the current action by way of opposing the summary judgment application would be to allow them a second bite at the proverbial cherry. There must be an end to all litigation involving the same issue.

[18] In *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 at p 76 there is a helpful passage quoted by His Lordship Sharma J on the meaning of and motivation for the res judicata principle:

> In *Satyadhyan Ghosel and others v Sint Deorajin Dobl and another* AIR 1960 SC 941, the statement of the law on the subject is given thus:
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> > The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. *When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.* This principle of res judicata is embodied in relation to suits in s 11 of the Code of Civil Procedure; but even where s 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct. (Emphasis added.)

[19] The above passage was endorsed by the Court of Appeal in *Hartecon JV Sdn Bhd v Hartela Construction Ltd* [1996] 2 MLJ 57; [1996] 2 AMR 1457 at p 1468.

[20] I will therefore not allow the issue of conspiracy to defraud on the part of the defendants in the 2008 suit and that includes the fifth defendant MIDF who is the plaintiff here to be relitigated again. The defence raised here by the defendants and in the supporting affidavits was the gravamen of the offence launched in the 2008 suit which had been dismissed by His Lordship Mohd Zawawi Salleh J.

[21] Having come to that conclusion what then is left of any triable issues that would justify the plaintiff's claim going for trial? None whatsoever! By paras 4–5 of the plaintiff's affidavit in support the plaintiff had verified the letter of offer by the plaintiff to D1 and the first HPA signed by D1 as well as the salient terms of the first HPA namely that D1 was to pay back the facility granted by way of 60 instalments of RM24,086.60 on the 30th day of each month commencing 30 May 2006 together with interest at 4%pa and in default, default interest of 15%pa shall be imposed. By para 7 of the plaintiff's affidavit in support the plaintiff averred that as a result of the breach of first HPA through the failure, neglect and/or refusal of D1 to pay the instalments as agreed, the plaintiff through its solicitors had issued a notice of demand dated 13 December 2007 to the first defendant and also to terminate the first HPA and to claim the amount then owing of RM1,411,640.58 as at 23 October 2007. A notice of demand dated 13 December 2007 was also sent to D2—D3 as guarantors under the guarantee and indemnity agreement signed by D2—D3 in favour of the plaintiff dated 22 May 2006.

[22] The details of the amount claimed under the first HPA were set out in para 11 of the plaintiff's affidavit in support:

Particulars	
Industrial Hire Purchase Agreement I	(RM1,204,330.10)
Balance Principal	RM1,153,052.65
(+) Balance Interest	RM278,377.84
(+) Balance Default Interest	RM195,059.90
Amount Outstanding as at 31 August 2011	RM1,626,490.39

[23] The affidavits filed by the defendants to oppose the summary judgment application seem to confine themselves to the assertion that the principle of res judicata applies in that the current claims of the plaintiff could have been raised by way of a counterclaim in the 2008 suit but as it was not raised then when it could have been raised, it cannot be raised now by way of a separate suit and much less seeking to enter summary judgment against the defendants here for the claims under the first HPA. The defendants here had applied to strike out the plaintiff's claim on ground of res judicata in the broader sense of issue

estoppel and I had dismissed the said application and had given my written judgment on it. I do not wish to repeat myself save to quote the following from the judgment:

> I can do no better than refer to the Court of Appeal case of *Chee Pok Choy v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321 where His Lordship Gopal Sri Ram JCA (as he then was) held at p 358 (MLJ), pp 332–333 (CLJ) as follows:
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> > Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.
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> > In *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 532, 573, Lord Upjohn said:
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> > > As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick case* [1938] 4 All ER at p 755; [1939] AC at p 21)). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind*. (Emphasis added.) In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93, 109, Lord Keith of Kinkel expressed the following view: In my opinion Your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. *One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result,* as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss case* [1966] 2 All ER 536 at p 573; [1967] 1 AC 853 at p 947. (Emphasis added.)
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> > In a later passage, I find Lord Keith saying:
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> > > Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process.

[24] The above proposition was approved in the House of Lords in *Johnson v Gore Wood & Co (a Firm)* [2001] 1 All ER 481 at p 499 where Lord Bingham of Cornhill said this of abuse of process:

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> … and *there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive*. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. (Emphasis added.)

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[25] Lord Wilberforce, giving the advice of the judicial committee of the Privy Council in *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411, 425, had reiterated the same caution earlier:

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> The second defence is one of 'res judicata.' There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in *Henderson v Henderson*, 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words: is 'there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings:' at p 590. This reference to 'abuse of process' had previously been made in *Greenhalgh v Mallard* [1947] 2 All ER 255 *per Somervell LJ and Their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.* (Emphasis added.)

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[26] Having then a more proper perspective of the plea of res judicata and especially that of issue estoppel, can it be honestly said that the plaintiff's claim here is an abuse of the court's process. Certainly not! The plaintiff is validly and legitimately at liberty to bring this claim for breach of contract in the hire purchase agreements and in the guarantee and indemnity and indeed more so after the defendants who as plaintiffs in the previous 2008 suit had been dismissed even after a no case to answer submission. The plaintiff should not be shut and stopped from pursuing a genuine claim which claim is now more easily disposed of as the earlier allegations of a conspiracy to defraud had been dealt with and dispose of in the earlier suit. If the earlier 2008 suit had ended in favour of the plaintiffs there, it would have been pointless to bring another claim for breach of the hire purchase agreement. Under such a circumstance if

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A the plaintiff here were to bring such a claim then the defendants may well be entitled to raise the plea of res judicata and apply to strike out the suit. However the reverse is true here: the plaintiffs' claim in the previous 2008 suit had been dismissed and D5 there who is the plaintiff here is entitled to proceed unimpeded to claim for breach of contract. There is no harassment of the B defendants here as the issues are totally different. It would be a grave injustice to the plaintiffs if it now cannot proceed and prosecute its claim eventhough the allegations of fraud against it had been dismissed. This is an example if I may say where the strict application of the plea of issue estoppel would yield an unjust result and undermine the very rationale for the doctrine of res judicata C and in particular issue estoppel.

[27] In a very real sense the arguments of the defendants in their failed application to strike out the plaintiffs suit here is the mirror image of their arguments to now resist the plaintiffs summary judgment application. Having D rejected the defendants' arguments for striking out the plaintiffs suit and that being the only argument too to oppose the summary judgment application, it would appear that the defendants have no legs to now stand on where the first HPA is concerned.

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[28] In essence what the defendants had raised in their defence, affidavits and in their submission through their counsel, Mr Lim Yew Hock, to oppose the summary judgment application is a question of law. The question of law being whether the defendants can use the principle of res judicata in the F broader sense of issue estoppel to deny the plaintiff's claim here and by so doing to deny the plaintiff of its summary judgment application? The correct approach has been set out in the Supreme Court case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 where at p 407 His Lordship Mohamed Azmi SCJ held:

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> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer H to understand', (see *Cow v Cassey* [1949] 1 All ER 197 and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at p 516).

PRONOUNCEMENT

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[29] Having decided on the question of law the way I did for the reasons I had given, I had no doubt that the plaintiff's application for summary

judgment for claims under the first HPA must be allowed and I so allowed judgment to be entered for prayers (a)–(b) of the claims only with half the fixed costs for summary judgment.

Application allowed in part with half the fixed costs for summary judgment.

Reported by Kohila Nesan